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Issue Date: 09 November 2004

Case No.: 2004-LHC-937

OWCP No.: 10-039539

IN THE MATTER OF

THOMAS DON BUTLER,
Claimant

vs.

NORANDA ALUMINUM, INC.,
Employer

APPEARANCES:

LEWIS FLEISHMAN,
On Behalf of the Claimant

LAWRENCE H. ROST,
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.,* (the "Act" or "LHWCA"). The claim is brought by Thomas Butler "Claimant" against Noranda Aluminum ("Noranda"), "Employer." Claimant sustained lower extremity and neck injuries during his employment with Noranda on January 16, 2002. Claimant asserts that he is entitled to permanent partial disability benefits for his scheduled disability and permanent total disability benefits for his unscheduled disability, as well as future medical expenses. A hearing was held on May 14, 2004 in St. Louis, Missouri, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Joint Exhibit No. 1; and

2) Employer's Exhibits Nos. 1 -14; and

3) Claimant's Exhibits Nos. 15-34.

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely received by both parties. This decision is being rendered after giving full consideration to the entire record.[1]

STIPULATIONS[2]

The Court finds sufficient evidence to support the following stipulations:

1) Jurisdiction is not a contested issue. Claimant was injured while working on navigable water. His work formed an integral part of the loading/unloading process.

2) The date of Claimant's injury/accident was January 16, 2002.

3) Claimant's injury was in the course and scope of employment.

4) An employer/employee relationship existed at the time of the accident.

5) Employer was advised of the injury on January 16, 2002.

6) An Informal Conference was held on January 6, 2004.

7) Claimant's average weekly wage at the time of the injury was $853.93. The compensation rate was $569.32.

8) Temporary total disability was paid from January 16, 2002 through January 26, 2004 at a rate of $569.00 per week for 53 weeks. The total amount paid was $60,267.09.[3]

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[1] The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX – Claimant's Exhibit, RX – Employer's Exhibit, and TR – Transcript of the Proceedings.

[2] JX-1

[3] The parties are aware that fifty-three weeks of compensation paid at $569.00 per week does not total $60,267.09.

9) Medical benefits totaling $145,553.96 were paid.

ISSUES

The unresolved issues in these proceedings are:

(1) Nature and Extent of Disability;

(2) Entitlement to Future Medical Treatment;

(3) Interest; and

(4) Entitlement to Attorney's Fees

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Thomas Butler

Thomas Butler is fifty-five years old and has been employed by Noranda Aluminum for twenty-five years at the Marston, Missouri facility. At the time of his injury, he held the position of material handling utility at the river. His responsibilities included pushing ore inside the barge with a Bobcat to a position where a vacuum could remove it. He was injured on January 16, 2002 while climbing out of the barge by ladder. He testified that the ladder slipped to the left when he was near the top, and he fell approximately sixteen feet from the ladder into the barge. He landed on his heels and injured his ankles and neck. Mr. Butler was taken to St. Francis Hospital in Cape Girardeau, Missouri and was seen by Dr. Ritter, the attending orthopedic physician at the hospital. TR 29-31; 72-76.

Mr. Butler testified that Dr. Ritter performed three surgeries on him. The first surgery was performed on the day of his injury, and the second surgery was performed on March 11, 2002 to remove pins from his left leg. The third surgery was on April 16, 2002. Mr. Butler testified that when he developed knots on the bottom of his feet, his case worker, Betty Brooks, advised him to seek a second opinion. He saw Dr. Appleman, who recommended that he wear braces to take weight off of his ankles. Dr. Ritter then prescribed braces for Mr. Butler's feet. Mr. Butler described his ankle braces as a leather strap extending upwards to his knee with two rods and a metal support. He testified that he wears the braces every day that he is on his feet. TR 40-44.

Mr. Butler testified that he began to experience sharp pains in his neck and left arm extending through his fingers with symptoms of tingling and numbness in his fingers, which caused Dr. Ritter to refer him to a neurosurgeon, Dr. Yingling. Dr. Yingling performed surgery on his neck to alleviate a disk problem. Mr. Butler explained that the surgery only relieved a degree of pain, making the pain bearable, but that he continued to experience pain and numbness in his neck. TR 77-80.

Mr. Butler testified that Dr. Yingling referred him to Dr. Frauwirth, a pain doctor. Among other medications, Dr. Frauwirth prescribed a patch that numbed the pain in his neck. Mr. Butler saw Dr. Frauwirth until September 1, 2003, when he was advised by Dr. Ritter to see his family physician instead for his prescriptions. At that point, Mr. Butler returned to Dr. Pfefferkorn, a general physician for Noranda who had treated Mr. Butler for five years predating the injury. Mr. Butler continues to currently see Dr. Pfefferkorn. TR 29-46, 76, 83-87.

On March 24, 2003 Mr. Butler entered into a memorandum of understanding with Noranda regarding his conditional reinstatement as an employee. Billy Fowler, the chief steward of the union, participated in the process that led up to the agreement. Mr. Butler described the conditions of the agreement as follows: he was to return to his position as a material handling utility at the river, his hours were to be 6:30 a.m. to 2:30 p.m., he was to work five days a week, he would work overtime as requested, and he was to perform tasks pursuant to his physical restrictions. If no work was available at the river, he was to be assigned to other tasks, including serving as a door watch to a confined space. At the hearing, Mr. Butler maintained that disputes about his physical restrictions were never resolved. He also admitted that he requested to return to the river job, rather than the other jobs suggested by Dr. Ritter. He did not feel he was capable of doing those jobs. The memorandum also included a condition that his performance was to be reviewed every ninety days to determine if his conditional reinstatement would be continued or terminated. Mr. Butler clarified at the hearing that he did not agree to the reinstatement, but signed it because the alternative was to voluntarily quit. Mr. Butler expressed dissatisfaction with the door watch position, testifying that most door watch tasks require climbing one to two flights of stairs. He also opined that sitting in the heat or cold all day would present a difficulty and that the position would not allow him to adequately move and elevate his feet. He expressed concern that he would not be able to safely evacuate from this position in an emergency. TR 91-100, 117, 129.

Mr. Butler returned to work on March 29, 2004. His pay had increased from $15.63 to $16.65. On the first week back, Mr. Butler worked twenty four hours. He testified that he missed one day due to an appointment with Dr. Pfefferkorn and one day because he called in sick due to neck pain. The following week, beginning on April 5, he also worked twenty-four hours. He missed one day due to a chiropractor appointment and the other day was Good Friday. The week of April 12, he again worked twenty-four

hours, missing one day due to a doctor's appointment and one day for vacation. The following week, beginning on April 19, he took a week's vacation. During this week, he attended a deposition and a doctor's appointment. The week of April 26, Mr. Butler again worked twenty-four hours, taking off for another deposition and doctor's appointment. TR 104-109.

Mr. Butler testified that since he has returned to Noranda, he has physically worked at the river for a total of two hours. The remainder of the time he has spent sitting in a chair, reading the paper and talking with the other employees. He testified that he has diligently tried to go back to work and has given the best effort he could in light of his physical condition. However, he also admitted that when he was asked to train for the door watch position on May 7, 2004, he did not attempt it because his ankles hurt and the heat was too great. He instead went home. TR 96-98, 110-113.

Mr. Butler testified that he uses a cane often and takes his walker with him to work daily. He keeps his wheelchair attached to his vehicle at all times in case he has a need for it. Mr. Butler testified that he parks in the nearest handicapped parking spot, which is sixty yards from his clock-in location. He then waits for a guard to bring him to the river. Mr. Butler noted that Mr. Eisenbach, Noranda's representative in negotiations, had agreed to furnish transportation about the facility; however, at particular jobs transportation to a bathroom or to the lunch room is not provided. TR 68-71; 99-100.

Mr. Butler described that since he has returned to the facility, his neck aches constantly and his feet bother him when he is standing or walking frequently. He testified that he has not complained about his physical problems to anyone at Noranda because he believed that if he complained about his condition, his reinstatement would be terminated. Prior to his injury, Mr. Butler had been treated by Dr. Pfefferkorn for hypertension. Mr. Butler testified that his hypertension has worsened since his injury. On May 5, 2003, he was sent home from work when a company nurse found that his blood pressure was high. The following day he was sent home because he had strained his shoulder lifting his walker out of the guard's truck. Mr. Butler testified that his attempts to return to work have caused him stress. TR 87-91, 112, 121, 132.

Throughout his work history at Noranda, Mr. Butler has held various jobs. He described duties he performed as a package trucker in the metal service department, an ECL crane operator in the "pot room," and a utility in pot service. As a package trucker, he would band billets, stack them, and load them onto a truck with a forklift. Mr. Butler did not feel that he had the ability to currently perform those duties due to the climbing required to get on and off of the forklift and the roughness of the forklift. He noted that driving the forklift would require frequent movement of his neck, because he has to be watchful of other personnel when backing up. He explained that a transition from the dock to a railcar in the forklift is a rough transition and that once inside the railcar, it was dark and difficult to see backing up. As an ECL crane operator in the pot room, he

operated an overhead crane that carries large hoppers from one end of the pot room to the other. He explained that metal is made from raw materials in the pot room and that a pot is a large steel container with anodes that heat ore. Mr. Butler stated that the pots are up four flights of stairs and that the pot room is magnetized, which would interfere with his metal braces. Additionally, the extreme heat of the pot room, which can reach over one hundred degrees Fahrenheit, would likely cause a rash under his braces due to sweating and would affect the Lidoderm patches that he wears on his neck for pain. Additionally, to get inside of the ECL crane, it is necessary to climb twenty-four to thirty feet of stairs. In this position he also operated a jackhammer using foot controls, which would now be too strenuous for him. As a utility in pot service, he transported pots from the pot room to the main building. He testified that he could not do this job because it required frequent walking of a distance up to half of a mile. It also required being in the pot room, where the magnetic field would affect his metal braces. TR 33-40, 45-48.

His last position was as a material handling utility at the unloading dock on the Mississippi River where Noranda receives ore and alumina from barges. He held this position for five years. The unloading process involved inserting vacuums, or "sucks" at the northern and southern ends of a barge to remove the material. A laborer was lowered into the barge to push the excess material to the "sucks" with either a Bobcat or a Caterpillar ("CAT"). On the day of Mr. Butler's injury, the CAT was not in service and the south crane had been broken for one and a half years. Because the south crane was broken, Mr. Butler had used a ladder to enter and exit the barge. Once inside the barge, Mr. Butler used a rope system to guide the barge into the correct position for the sucks. He testified that other duties of this position included cleaning buildings four to five flights high, using a forklift to dump hoppers filled with waste, cleaning the top of the barge, and climbing on top of ore tanks to switch inputs. TR 51-58.

When Mr. Butler returned to Noranda after his injury, he pushed material inside the barge on one occasion, April 8, 2004. He explained that he and the CAT were lowered into the barge. He set down the CAT, lined it up correctly, climbed onto it, and unhooked it from the cable. He testified that the ore inside the barge created big hills that required him to frequently look backwards to see where he was going. The uneven floor of the barge additionally created a rough ride. He testified that he completed the job in two hours, but that it was very strenuous on his body. The CAT was equipped with complete hand controls, but Mr. Butler felt it necessary to use the foot controls and had hurt his feet. He also testified that the CAT air-conditioner was not working. Mr. Butler said if he attempted the job again, it would be very uncomfortable and he probably could not perform for two hours. He also admitted that he did not ask to be relieved from the CAT nor did he complain to anyone on April 8, 2004. TR 58-64, 116.

Mr. Butler was asked to reference the job description of a material handling utility in comparison to the functions he currently performs in that position. He testified that he no longer operates the bobcat, nor shovels ore, nor uses the ropes, cables or rigging to

pull the barge covers or tie off the barge. He agreed that the physical demand included considerable physical exertion and extensive periods of heavy physical work. He agreed that the job involved exposure to very disagreeable physical conditions, including inclement cold, wet weather in the winter and extreme heat in the summer. He testified that safety is an important concern in that particular job. Possible emergencies range from ammonia leaks at the neighboring power plant to tornadoes, storms and ice. He expressed concern about his ability to evacuate in the case of an emergency. TR 64-68.

On cross-examination, Mr. Butler admitted that he told Karen Kane, his vocational rehabilitation counselor, that he was not interested in working or in being retrained. He testified that he is not motivated to work because he hurts. He admitted that he did not try any of the jobs suggested by Dr. Ritter. Mr. Butler testified that he has six rental houses and two commercial properties. He stated that he mentioned to his case worker that he would like to try living in Arizona with his sister because the weather might help ease his aching in his neck and feet. He testified that he has never been offered a sedentary office job. TR 114, 118, 125, 131-133.

Billy W. Fowler

Billy Fowler is Chief Steward of United Steel Workers of America, who had worked for Noranda for twenty-nine years before being elected to his current office. Mr. Fowler testified that he is not a personal friend of Mr. Butler but has seen him occasionally at the Noranda facility. TR 136-138.

Mr. Fowler first learned of Mr. Butler's situation when he became involved in the memorandum of understanding discussions, which began on June 20, 2003. Mr. Fowler opined that Mr. Butler could not perform the ECL crane job because the magnetic field's effect would pull on his braces, because operating the crane required a significant amount of twisting, and because entering the crane required climbing three steps. He also opposed Mr. Butler working on the hand-controlled forklift because his work area would be congested with other personnel and operating the forklift via hand controls alone presented a safety hazard. He also opposed the Ericson tow motor job because entering the tow motor required a six step ladder climb and because the rough floors cause a significant amount of bouncing. He noted that Mr. Butler would also have to turn his head frequently to look backwards and that the tow motor would also be operated near a magnetic field. Mr. Fowler testified that he has driven the forklift and the tow motor himself previously. Mr. Fowler testified that he and the union vice president refused to sign the agreement as neither they nor Mr. Butler agreed with the conditions. When Mr. Butler decided to sign it, they agreed to sign it only as witnesses. TR 138-149.

Mr. Fowler testified that the designated emergency shelter closest to the river is a control unit above the barge. Mr. Butler would be lifted up to the unit in a bucket by crane. If the crane was out, he would have to crawl on a ladder to reach the unit. His tornado shelter would be under a pier 400 to 600 feet away. TR 145-146.

Rick Eisenbach

Rick Eisenbach is the superintendent of employee relations and security at Noranda. He has worked for Noranda for twenty-three years in some capacity. He began as an industrial engineer performing time studies on particular jobs to make them more efficient. He testified that in this capacity he became familiar with the operation of Noranda's equipment and the requirements of each position. Mr. Eisenbach was Noranda's representative in the negotiations with Mr. Butler. TR 161-164.

Mr. Eisenbach initially met with Mr. Butler in June of 2003 to discuss job possibilities at Noranda. He testified that this meeting was unfruitful because he had chosen jobs based only on Mr. Butler's neck conditions, without including the ankle problems. Subsequent to this meeting, Mr. Eisenbach put together a package of jobs that were possibilities for Mr. Butler, including the crane operator, package trucker, ES utility, switchboard operator, pulling for overtime, and logging trucks. TR 166-170.

Mr. Eisenbach testified that in October of 2003, he asked Dr. Ritter to visit the facility so that he could obtain a better understanding of the jobs available. Dr. Ritter was shown the equipment utilized and spoke with a laborer for each position. Dr. Ritter approved the ECL crane operator, Ericson tow motor operator, and package trucker positions subject to modifications for hand controls. He disapproved the river operator position because the operator stood all day and the floor sweeper position because it was too strenuous. Mr. Eisenbach testified that Dr. Ritter saw each job for about fifteen minutes and did not know if Dr. Ritter was given the written job descriptions. Mr. Butler was not present during this visit. TR 170-177; 206-207.

Mr. Eisenbach's opinion was that the package trucker position was best for Mr. Butler. The job would be modified so that Mr. Butler would not be required to the physical labor of banding and stacking the billets; he would only do paperwork and load trucks. Mr. Eisenbach testified that the floor is rough, but it did not jar the operator around to the extent that it would be problematic for Mr. Butler. TR 177-179, 207.

When Mr. Eisenbach informed Mr. Butler on December 2, 2003 that he would be placed in the package trucker position, Mr. Butler asked if he could work as a material handling utility at the river. Mr. Eisenbach spoke with Darren Holter, the general foreman at the river, who told him that Mr. Butler could be utilized in that capacity. However, given that Mr. Butler could not perform all of the tasks of that position, Mr.

Eisenbach also included a confined space attendant position to fill the remaining time. Mr. Eisenbach explained that the confined space attendant position is one where the person sits outside of a confined space, monitors the gases inside the space and reports any problems. The job fulfills an OSHA requirement. Mr. Eisenbach sent Dr. Ritter pictures of the equipment, pictures of the confined space attendant's physical area and descriptions of the jobs. Dr. Ritter approved the job subject to all equipment being hand controlled. Mr. Eisenbach testified that Mr. Butler signed the agreement on March 24, 2004. TR 181-187, 195.

Mr. Butler first returned to work on March 29, 2004. After Mr. Butler missed two days for doctors' appointments, three days because he called in sick, two days for personal business, and a week's worth of vacation, Mr. Eisenbach met with him and a union official to discuss the situation. On April 26, 2004, they discussed adjusting his working hours so that he would come in at 8:00 a.m. and leave at 4:00 p.m. Mr. Eisenbach testified that he explained to Mr. Butler that their agreement would not be terminated unless he was incapable of performing work. Mr. Butler then called in sick on May 3 and 4 due to high blood pressure; although, his doctor had not kept him off of work. He came to work on May 5, but went home due to high blood pressure. He came into work on May 6, but was sent home because he hurt himself getting his walker out of the truck. On May 7, Mr. Butler refused to train to be a confined space door watch because his ankles hurt, and he again went home. TR 188-194.

Darren Holter

Mr. Darren Holter is a general foreman at Noranda Aluminum in the air control and river unloading department. He testified that Noranda has two pieces of equipment for pushing material inside the barge: a Caterpillar and a Bobcat. The Caterpillar is capable of being operated with two hand-controlled joysticks and has an air-conditioned cab. Mr. Holter testified that he has used the Caterpillar and that he climbed two steps to enter it. He stated that it is possible to change one's seating position inside the cab. He also testified that the rubber tracks on the Caterpillar give it a smoother ride than the Bobcat. He testified that an experienced driver does not need to look behind himself frequently when operating the equipment. TR 216-223.

Mr. Holter testified that Mr. Butler returned to work on March 29, 2004 as a material handling utility. He stated that Mr. Butler's position has been modified to eliminate the duty of removing covers and that he only functions as a material pusher. Mr. Holter testified that this task is beneficial to Noranda because it is required of every barge that is unloaded. Mr. Butler's position has also been expanded to include duties as a confined space attendant, which fulfills a full-time regular need for Noranda. Mr.

Holter explained that a confined space monitor can sit or stand as he chooses, as long as he can see the monitor. He testified that the confined space monitor is a high seniority job that is usually granted to employees who have served at Noranda for twenty years. TR 223-227.

Mr. Holter testified that Mr. Butler has not complained to him of any conflict between his duties and his work restrictions. Mr. Holter testified that he is satisfied with the progress that Mr. Butler is making, except for his frequent absences, which make training difficult. He explained that it was expected that Mr. Butler would need time to get reacclimated with the new equipment. He testified that the day when Mr. Butler operated the Caterpillar, he performed satisfactorily and completed the task. His documents showed that Mr. Butler was inside the barge from 7:10 a.m. to 10:35 a.m. that day. Mr. Holter admitted that for the remainder of his ten days of work Mr. Butler did not do anything of benefit. Mr. Holter testified that Mr. Butler can be productive as a confined space attendant, but admitted that the job will not always be on the ground floor and the jobs often require climbing stairs. He testified that most of the confined space jobs are in the carbon base on the first level of reactors. Regarding safety concerns, Mr. Holter testified that the foreman monitors weather conditions frequently and that there is sufficient warning time when severe weather is approaching. He testified that the control room is the shelter in the case of an ammonia leak. TR 228-233, 237, 241, 247-250.

II. VOCATIONAL EVIDENCE: Deposition

Karen Kane

Karen Kane is a certified rehabilitation counselor referred to Mr. Butler by the U.S. Department of Labor in January of 2003. She first met with Mr. Butler on February 7, 2003, approximately one and a half years after his injury. Ms. Kane reviewed the records of Drs. Yingling and Ritter. She had some records from Dr. Frauwirth, whom Mr. Butler had just begun seeing. She did not have the records of Dr. Pfefferkorn, but was aware that Mr. Butler was being treated for hypertension. She considered the restrictions given by Dr. Frauwirth that Mr. Butler must be allowed to change his sitting positions frequently, work at a height below his shoulder, and perform non-strenuous work. She also considered Dr. Ritter's May 6, 2003 restrictions that Mr. Butler could stand only for a maximum of two hours a day in short increments and that he perform primarily sedentary work. CX-33, pp. 9, 14-17, 25-27.

Ms. Kane testified that she had only one direct contact with Noranda regarding job availability for Mr. Butler. She was never specifically told that Noranda would not offer Mr. Butler a job, but was told that only if he received the necessary training, would he be considered for a sedentary office job. CX-33, pp. 23, 43, 47.

Ms. Kane issued a report on July 14, 2003 containing a random sampling of sedentary employment available in the Charleston, Missouri area. Ms. Kane found that based on Mr. Butler's work history, education, and physical capabilities, he was eliminated from accessing employment in the greater Charleston, Missouri area. She found some jobs that were attainable for Mr. Butler if he participated in one year general office technology training program. However, Mr. Butler communicated that he was not interested in participating in a training program as he did not think he had the ability to attend, given his physical restrictions and health issues. At this point, George Bocox of the U.S. Department of Labor directed her to close the file. CX-33, pp. 30-35.

Ms. Kane testified that Mr. Butler expressed reluctance with vocational rehabilitation and frustration that his doctors had not concluded him to be permanently and totally disabled. He communicated that he was considering moving to Arizona with his sister. Ms. Kane testified that Mr. Butler called her on one occasion after she had closed his file to inquire if training was still available; however, she could not recall the date. CX-33, pp. 40-41.

III. MEDICAL EVIDENCE: Depositions and Records

Dr. August Ritter, III

Dr. Ritter became Mr. Butler's treating physician after his injury. Dr. Ritter testified that Mr. Butler was admitted at St. Francis Medical on the day of his injury with severe crushing type injuries of both lower extremities and complaints of discomfort in his neck. Dr. Ritter performed an initial surgery on January 16, 2002 where he applied external and internal fixators to correct the fracture in each tibia. He next performed surgery on March 11, 2002 to remove the internal fixator from his right tibia. On April 26, 2002 he performed a removal of the external fixator on the left tibia and cultured the pin sites. RX-8, pp. 6-8.

Dr. Ritter referred Mr. Butler to Dr. Yingling, a neurosurgeon, to evaluate his cervical complaints. Dr. Ritter testified that he made this referral as a result of complaints made by Mr. Butler that were related to his accident at work. On April 8, 2002, Dr. Ritter prescribed Mr. Butler a Medrol dose pack to reduce inflammation in his neck. RX-8, pp. 8-9, 22.

On November 26, 2002, Dr. Ritter released Mr. Butler to work with the limitation that he could stand for a maximum of one to two hours total per day in fifteen minute intervals. He specified that Mr. Butler needed primarily sedentary light duty work. He opined that Mr. Butler was at maximum medical improvement. On December 18, 2002, Dr. Ritter noted that Mr. Butler was not yet tolerant of even one hour per day on his feet and that he was primarily using his wheelchair for mobilization. He again advised that Mr. Butler perform only sedentary work. On January 27, 2003, Mr. Butler visited Dr.

Ritter because he had been completely unable to bear weight on his ankles for two to three days. Dr. Ritter reiterated that Mr. Butler was capable only of sedentary work and remarked that Mr. Butler had not yet returned to work as no sedentary work was available. RX-10, pp. 4-6, 12-14.

On May 6, 2003, Dr. Ritter generated a report to Sedgwick stating that it was safe for Mr. Butler to stand on his feet for no more than one to two hours a day in short increments. He stated that Mr. Butler was at maximum medical improvement with long term permanent and lasting restrictions. He also recorded a permanent partial impairment rating of sixty percent for the ankles, or thirty percent for each ankle. RX-8, pp. 17-19.

Dr. Ritter wrote in a report dated August 23, 2003, "I believe he has demonstrated an attempt at return to work and has had no evidence of ability to do so. It is my feeling he is not going to be employable in any capacity long term, and therefore, would be considered permanently and totally disabled, and this would be considered retroactive to the time of his injury." RX-8, pp. 34-35.

Dr. Ritter testified that he was contacted by Jim Robinette at Noranda to visit the facility to determine if certain jobs were medically safe for Mr. Butler. He testified that he was not paid for this visit. Mr. Rost, Noranda's attorney, was also present during the visit. He issued a report approving some of the jobs on October 9, 2003. He opined that it would be medically safe for Mr. Butler to operate ECL crane subject to difficulties getting in or out on bad days, to use the forklift if modified to operate with hand controls only, to use the Ericson tow motor if modified to operate with hand controls only and if he was not required to get on and off the equipment frequently, to perform material handling or equipment management if not required to be on his feet. He testified that he is one of several orthopedists to which Noranda refers injured workers. Dr. Ritter testified that he changed his mind from his August 23, 2003 opinion after he saw the available jobs at Noranda. RX-8, pp. 23-30.

Dr. Ritter saw Mr. Butler in December of 2003. He recalled that Mr. Butler had been upset that he had determined to have some ability to return to work. He said that Mr. Butler also communicated to him that the jobs Dr. Ritter had approved with modifications would not be modified accordingly by Noranda. RX-8, pp. 33.

Dr. Ritter wrote another report to Noranda, on January 26, 2004, in response to a job requested by Mr. Butler, but Dr. Ritter could not recall the specific job. Dr. Ritter testified that he felt the stair climbing involved in that particular job may have pushed Mr. Butler's abilities, but approved the job so long as Mr. Butler was comfortable climbing the stairs. RX-8, pp. 30-33.

At the formal hearing, Dr. Ritter testified that he would expect Mr. Butler to experience pain when walking given the presence of significant post-traumatic arthritis in his ankles. He has suggested that Mr. Butler may need an arthrodesis surgery in the future, which is a fusion that would result in the loss of motion at the ankle joint. RX-8, pp. 11-14.

David G. Yingling, M.D.

Dr. Yingling is the neurosurgeon to whom Dr. Ritter referred Mr. Butler. On May 16, 2002, Dr. Yingling diagnosed Mr. Butler with C7-T1 disc rupture with C8 radiculopathy based on an MRI scan. Dr. Yingling performed a diskectomy on May 31, 2002. On August 13, 2002, Dr. Yingling advised that Mr. Butler was able to return to work on a light duty, sedentary basis with the limitation of lifting a maximum of ten pounds. On October 8, 2002, Dr. Yingling opined that Mr. Butler was at maximum medical improvement, noting that he continued to have muscular stiffness and soreness on the left side of his neck and shoulder with some sensory symptoms in the medial digits of his left hand. He also noted that Mr. Butler had not improved with physical therapy, epidural injections or trigger point injections. On this date, he released Mr. Butler to work without restrictions. When Mr. Butler returned with complaints of pain on January 7, 2003, Dr. Yingling referred him to a physiatrist for additional rehabilitation. Dr. Yingling last saw Mr. Butler on April 29, 2003. Mr. Butler continued to complain of muscular pain in his neck and shoulders. Dr. Yingling advised that any restrictions related to Mr. Butler's pain should be given by his physiatrist, Dr. Frauwirth. In terms of his residual radicular symptoms, Dr. Yingling found him to be at maximum medical improvement and rated him at a permanent partial disability of eighteen percent. RX-9.

Neal H. Frauwirth, M.D.

Dr. Frauwirth saw Mr. Butler on January 23, February 20, and March 27, 2003. He prescribed pain medications, physical therapy, and a Lidoderm patch for local pain control in his neck. On June 19, 2003, Dr. Frauwirth issued a letter stating that Mr. Butler should be allowed to change his sitting position frequently and work at a height below shoulder level. He released him to return to work at a non-strenuous level. He noted that Mr. Butler had normal range of motion in his neck except for bilateral neck flexion. RX-12.

David A. Pfefferkorn, M.D.

Dr. Pfefferkorn's practice is general internal medicine and non-evasive cardiology. He first encountered Mr. Butler in April of 2000, when Mr. Butler came to him for a physical covered by his insurance through Noranda. He first heard of Mr. Butler's accident through his daughter, who was a friend of Mr. Butler's son. CX-23, pp. 6-8.

Dr. Pfefferkorn testified that he was Mr. Butler's most recent treating physician in terms of prescribing him medications. He began prescribing Mr. Butler's medications on September 22, 2003 because Dr. Frauwirth had dismissed his patients when he moved to another state. Dr. Pfefferkorn reviewed a list of medications that Mr. Butler brought with him, but he received no documentation from Dr. Frauwirth directly. He has since seen Mr. Butler on five occasions. He opined that Mr. Butler's elevation in blood pressure is related to his accident because he has been subjected to mental stress in returning to work. CX-23, pp. 11-12, 15, 18, 25.

Dr. Pfefferkorn testified that a worker with a thirty percent impairment rating in each ankle would not pass a pre-employment physical to work at Noranda as a material handler. He testified that he did not think Mr. Butler would be able to repetitively lift one hundred pounds, use a wheelbarrow, pull a heavy steel cable, or walk on the uneven surface of the barge bottom. Dr. Pfefferkorn opined that Mr. Butler can not go back to his previous employment. CX-23, pp. 23, 26-27.

Dr. Pfefferkorn had observed the material handling utility position on a tour of the facility that he requested two to three years ago, prior to Mr. Butler's injury. Dr. Pfefferkorn considered Mr. Butler's pre-injury position to be "hazardous/medium-duty work." He considered the job hazardous because of extreme weather elements and because of the frequency with which the crane was not operating. Mr. Butler would have physical difficulty climbing the ladder out of the barge in case of emergency. He opined that Mr. Butler would have trouble getting on and off the front-end loader in the case of a dangerous situation and that the machine's rough ride would be painful for Mr. Butler. For these reasons, he opined that Dr. Frauwirth's restrictions were insufficient. CX-23, pp. 13, 19, 24.

On cross-examination, Dr. Pfefferkorn admitted that he has not observed the equipment Noranda presently uses with respect to Mr. Butler's job and that his opinion is based on the equipment he saw two to three years ago. He admitted that he had not seen the medical records of Drs. Ritter, Yingling, or Frauwirth. CX-23, pp. 29-32.

Angela Moore, R.N.

Angela Moore is a registered nurse employed by Noranda since May of 2000. She became Superintendent of Health Services on February 2, 2004. She was present in her capacity as Superintendent of Health Services at the meeting where Mr. Butler signed the memorandum of understanding. She testified that she was present in order to answer any medical questions that might be asked, but none were asked of her. She testified that

there was no discussion as to whether Mr. Butler would be capable of performing the physical demands of his job. Mr. Butler did not express any doubt as to whether he felt he could do the job. Her perception was that the meeting was congenial. CX-24, pp. 7-8, 12-14.

Ms. Moore testified that typically when an injured worker returns to work and experiences pain such that he needs time off or needs medical treatment, the worker would be required to report the problem to the medical department at Noranda to have it addressed. Ms. Moore testified that there is always a registered nurse on duty. She testified that generally injured workers are referred to Dr. Jones or Dr. Pfefferkorn. Ms. Moore has not seen any reports reflecting that Mr. Butler visited the medical department since he returned to work at Noranda. Ms. Moore testified that she has never made a request to have a physician come to the job site to determine whether or not an injured worker could perform a particular job. CX-24, pp. 18-21.

Victor J. Zuccarello

Mr. Victor Zuccarello is a certified occupational therapist who has been practicing for nineteen years. He practices at Mid-American Rehab in Cape Girardeau, which is a physical therapy and industrial rehabilitation firm. TR 252.

Mr. Zuccarello analyzed the findings of the functional capacity evaluation ("FCE") conducted by Southeast Missouri Hospital and the correspondence from Dr. Frauwirth dated June 19, 2003. Dr. Frauwirth concluded that Mr. Butler had normal range of motion in his neck except for bilateral neck flexion, the flexing of the ear towards the shoulder. The FCE also showed below average bilateral neck flexion on both sides. His FCE revealed normal neck muscle strength. Mr. Zuccarello testified that from a therapist's standpoint, these records suggest the Mr. Butler has "close to very near normal findings for range of motion and strength through the neck." He testified that Dr. Frauwirth's conclusion was consistent with the FCE. TR 256-262.

Mr. Zuccarello also analyzed the Pain Report from the FCE. He could not give a clear interpretation of the findings, suggesting that the language in the report may indicate that the Mr. Butler's pain was subjective. However, Mr. Zuccarello repeatedly testified that the language in the report was vague. He did not see any language in the FCE that suggested that Mr. Butler was a malingerer or that he gave submaximal effort. Mr. Zuccarello looked only at the FCE and Dr. Frauwirth's letter. He did not review the remainder of Mr. Butler's medical records. TR 262-266, 270-272.

IV. JOB DESCRIPTIONS

Potroom Crane Operator

Main duties include operating a cab control crane to ore up pot hoppers, move pot jacking frames, move siphon and crucibles as required, remove and replace spent anodes, transport materials, tools, and equipment for pot repair, and fill ore buckets.

Physical demand is moderate. Surroundings are classified as moderately disagreeable physical conditions. Hazards are described as exposure to minor cuts, burns and bruises with low probability of severe accidents. Physiological considerations include ability "to tolerate riding in a confined crane cab which is suspended overhead for prolonged periods of time."

Essential functions include: sitting in the crane for three hour periods without a break for up to ten hours per shift; walking from crane to crane; lifting a shovel with a maximum of nineteen pounds of ore; using bilateral foot controls on crane; climbing to and from the crane on ladders and stairs up to four flights; occasionally required to reach overhead to grasp the ladder to ascend the crane and to grasp hoses and buckets. RX-5, pp. 2-5.

Package Trucker in Metal Services Department

Main duties include stacking, weighing, and identifying packages, operating banding equipment, loading and unloading railcars and trucks, opening and closing railcars and trucks, adjusting dock positioning, changing utility supply lines such as quick disconnects, couplings, and clamps, hook and unhook signal crane, and various work with a jack hammer.

Physical demand is considerable with extensive periods of heavy physical work. Surroundings are classified as very disagreeable physical conditions. Hazards are described as frequent exposure to injuries of moderate severity while operating mobile equipment and moving metal.

Essential functions include: standing constantly when working in pig station; walking constantly throughout shift; sitting up to two hours without break in the forklift; twisting in both directions to drive backwards; traveling over rough terrain with potholes and railroad tracks, creating vibratory forces to the body; occasionally climbing up and down stairs throughout the shift; reaching overhead occasionally to release or set the crane hook. RX-5, pp. 6-9.

Environmental Services Utility in Plant/Environmental Services Department

Main duties include transporting, storing, and cleaning anodes, emptying trash hoppers, changing dust bags, operating mobile equipment such as the Ericson tow motor, adding shots to blast cleaners, and cleaning anode pallets.

Physical demand is considerable with extensive periods of heavy physical work. Surroundings are classified as very disagreeable physical conditions. Hazards are described as frequent exposure to serious bodily injuries.

Essential functions include: constant standing in general; constant sitting in the Ericson tow motor, which is vibratory and travels over uneven terrain; frequent twisting when driving; constant vibrating when using jack hammer; constant reaching to pry anodes loose overhead and foot level; frequent climbing up stairs and below catwalk; climb up and down Ericson tow motor. RX-5, pp. 10-13.

Material Handling Utility in Plant/Environmental Services Department

Main duties include switching barges, railcars and trucks into position for unloading, opening barge covers, railcar doors, and hoppers, splicing lines and cables to secure barges, changing dust collector bags, operating mobile equipment, and taking samples of raw materials as required.

Physical demand is considerable with extensive periods of heavy physical work. Surroundings are classified as very disagreeable physical conditions. Hazards are described as frequent exposure to serious bodily injuries.

Essential functions include: occasional standing and walking; sitting when operating mobile equipment; twisting to operate mobile equipment, which has minimal to severe vibratory force; occasionally move nozzle and connect extensions for sucking; shovel materials; lift barrels; attach elbows to railcar; carry blocks and lower with hoist to barge; carry sheet of pitch with partner; occasionally pull large rope and tie off barge; occasionally set brakes on car at overhead level; occasional climbing up and down stationary ladder to platform, in and out of mobile equipment, and in and out of barge. RX-6.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that

of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 2d 221 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221.

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. § 919(d) and 5 U.S.C. § 554, by way of 20 C.F.R. §§ 702.331 and 702.332. See Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986).

In order to demonstrate coverage under the LHWCA, a worker must satisfy both a situs and status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed. 2d 225.

The situs test originates from § 3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from § 2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Id. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker…." Id. To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

In this case, the parties do no contest jurisdiction under the Act. See JX-1. At the time of his injury, Mr. Butler worked for Noranda as material handling utility, participating in the process of unloading barges on the Mississippi River. TR 72. Therefore, the Court finds that jurisdiction under the Act is proper for this case.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a prima facie case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318 (1982). Once the claimant establishes these two elements of his *prima facie* case, Section 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990).

After the Section 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vicchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

In this case, the parties have stipulated that Mr. Butler's injury occurred within the course and scope of his employment with Noranda. See JX-1. This stipulation is supported by the record and is accepted by the Court. Mr. Butler testified that on January 16, 2002, he injured his ankles and neck when he fell from a ladder while climbing out of a barge at the Noranda facility. TR 74. Dr. Ritter testified that Mr. Butler was admitted to St. Francis Medical on the day of his injury with severe crushing type injuries of both lower extremities and complaints of discomfort in his neck. Dr. Ritter performed immediate surgery on Mr. Butler's ankles, and eventually referred him to a neurosurgeon to treat his neck pain. RX-8, pp. 6-8. Based on the foregoing, the Court finds that Mr. Butler suffered injuries to his ankles and neck on January 16, 2002, and that the injuries were related to his employment with Noranda.

NATURE AND EXTENT OF DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991).

Under this standard, an employee will be found to have no loss of wage-earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

The parties agree that Mr. Butler's ankle injuries are permanent disabilities. Claimant argues, however, that Dr. Ritter's rating of thirty percent ankle impairment should be increased to include his feet as well as his ankles. Employer argues that the thirty percent permanent partial impairment of each ankle should not be increased. The Court finds that Dr. Ritter's permanent partial impairment rating of thirty percent for each ankle shall stand. See RX-10, p. 5. Dr. Ritter was Mr. Butler's treating physician with

respect to his ankle injuries; therefore, his opinion is given great deference. Moreover, Claimant has presented no further medical evidence to demonstrate to the Court that the impairment rating should be extended to the feet. The Court finds that Mr. Butler's ankle injuries became permanent on November 26, 2002, the date Dr. Ritter issued an opinion of maximum medical improvement. See RX-10, p. 14.

The Court finds that Mr. Butler's neck injury, which is causally related to his fall at Noranda, became permanent on April 29, 2003, the date his neurosurgeon, Dr. Yingling, opined that Mr. Butler was at maximum medical improvement in his neck. See RX-9. The Court also accepts Dr. Yingling's permanent partial disability rating of eighteen percent for Mr. Butler's neck. See RX-9.

The Court next considers whether Mr. Butler suffers partial or total disability. Claimant has established a *prima facie* case of total disability because the evidence shows that he cannot return to his previous employment as a material handling utility at the river. Dr. Ritter restricted him to primarily sedentary work and advised that he may not stand on his feet for more than one to two hours a day in short increments. RX-8, p. 17. Dr. Fauwirth's restrictions were that Mr. Butler must be allowed to change his sitting position frequently, cannot work at a height above shoulder level and may only perform non-strenuous work. RX-12. Given these restrictions, Mr. Butler clearly lacked the ability to fulfill the material handling utility position, which Noranda's job description classified as heavy physical work. See RX-6.

Employer submits that Mr. Butler's disability is not total because suitable alternative employment was made available to him at the Noranda facility. Employer argues that the three jobs approved by Dr. Ritter and the modified material handling utility/confined space attendant job chosen by Mr. Butler are suitable alternative employment. Claimant argues that the jobs created by Noranda constitute sheltered employment and are not suitable alternative employment. The Board has held that an employer can meet its burden of establishing suitable alternative employment by offering the claimant a job in its facility, including a job specifically tailored to the employee's restrictions, so long as the job does not constitute sheltered employment. Spencer v. Baker Agricultural Co., 16 BRBS 205 (1984); Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986); Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10, 12-13 (1980). Sheltered employment occurs when an employee is physically incapable of performing the duties required by his job but nevertheless receives wages, or where the job is unnecessary to the employer's operations. Harrod, 12 BRBS at 13.

The Court finds that the modified material handling utility/confined space attendant job offered by Employer constitutes sheltered employment, because Claimant is physically incapable of performing its required duties and nevertheless receives wages. Noranda modified its material handling utility position to the extent that the only task Mr.

Butler is responsible for performing is to push ore inside the barge with hand-operated mobile equipment. See TR 182. After considering the testimony and documentary evidence, the Court finds that Mr. Butler is physically incapable of operating the CAT equipment due to his ankle and neck injuries. When operating the CAT from its confined cab, it is not possible for Mr. Butler to comply with Dr. Frauwirth's restriction that he change sitting positions frequently. See RX-12. Pushing ore with the CAT equipment takes from two to five consecutive hours: Mr. Eisenbach testified that this task occupied a maximum of four to five hours, Mr. Butler testified that on the one occasion he attempted the task he spent two consecutive hours on the CAT, and Mr. Holter's records showed that Mr. Butler was inside the barge for over three hours on that occasion. TR 61, 183, 237. The Court finds that Dr. Frauwirth's ankle restrictions preclude him from spending such an extensive period of time in the confined cab of the CAT. Further, Mr. Butler is incapable of safely operating the CAT without twisting to look behind himself when backing up the machinery. Mr. Butler testified that he experienced pain in his neck as a result of doing so. TR 61. Although Mr. Holter testified that an experienced equipment operator does not need to look behind himself, the Court concludes that Mr. Butler is not an experienced driver, given the newness of the CAT and his adjustment to hand control operation, and thus credibly needs to look behind himself when operating the CAT. See TR 220, 223. Additionally, the job's description on file at Noranda conflicts with Mr. Holter's opinion when it states, "operator sits and often must twist to operate equipment." See RX-6. Lastly, the Court finds Mr. Butler physically incapable of operating the CAT because the uneven floor creates a rough ride that is strenuous on Mr. Butler's body. Therefore, the job is not compatible with Dr. Frauwirth's restriction that Mr. Butler perform non-strenuous work. Mr. Butler testified that he ran into a seam in the flooring of the barge twice in his two hour period of pushing, that it was like running into a wall, and that it was strenuous on his body. TR 62. Additionally, the Noranda job description states, "[m]obile equipment has minimal to severe amounts of vibratory force depending on terrain traveled and equipment used." RX-6, p. 3.

Noranda combined the confined space attendant position with the modified material handling utility position because the pushing task occupies a maximum of four to five hours a day. TR 183. However, the Court finds that the confined space attendant position is impeded in the long term by Mr. Butler's ankle restrictions because the majority of the posts require climbing at least one level of stairs. Both Mr. Butler and Mr. Holter testified that the usual post is at reactors in the carbon base which are up one to two flights of stairs. TR 98; 247-248. Based upon Mr. Holter's testimony, Mr. Butler would effectively have to climb the stairs several times a day, because the bathroom and break room are on ground level. TR 248. Further, Employer's suggestion that Dr. Ritter approved this position is not conclusive. Dr. Ritter wrote that the position "meet[s] with our restrictions *other than the need to walk stairs on the job* . . . If Mr. Butler is comfortable enough he is medically safe doing this, if not he may have to do the other job as described." RX-9, p. 113 (emphasis added). Dr. Ritter did not approve the climbing of stairs, but found it allowable subject to Mr. Butler's comfort. Mr. Butler testified that

he frequently uses a cane, takes his walker to work daily, and sometimes uses a wheelchair. TR 68-69. Mr. Butler also testified that he thought it would be hazardous for him to climb the stairs. TR 98. The Court finds that a job requiring Mr. Butler to climb stairs several times daily is not within Mr. Butler's physical capabilities. Further the necessity of Noranda's need for Mr. Butler to fulfill this position is called into question by the fact that Noranda did not even attempt to train Mr. Butler for this position until May 7, 2004, over one month after he had returned to work for Noranda on March 29, 2004. See TR 96, 194.

Mr. Butler has received wages for a total of ninety-six hours since returning to Noranda. CX-35. However, Mr. Butler testified that since his return to Noranda, he has physically worked a total of two hours of benefit to Noranda, when he pushed ore on April 8, 2004. TR 110. Even given the time necessary for retraining and adjusting to new equipment, as suggested by Mr. Holter, the Court finds that the amount of time actually worked as compared to the amount of time for which Mr. Butler received wages is grossly unbalanced. Based on the foregoing, the Court finds that the modified material handling utility/confined space attendant job is sheltered employment. Further, even if the job is not sheltered employment, the job does not qualify as suitable alternative employment due to Mr. Butler's physical incapability of performing the job.

The Court finds that Employer has not shown suitable alternative employment by offering Claimant the ECL crane operator position, the package trucker position, and the Ericson tow motor operator position. The Court finds that Mr. Butler is physically incapable of performing these jobs. First, the Court is not persuaded by the fact that Dr. Ritter approved the jobs. Dr. Ritter observed each job for approximately fifteen minutes and did not review the written job descriptions. See TR 206-207. In addition, there is no evidence showing that Dr. Ritter considered the restrictions given by Dr. Frauwirth when evaluating the jobs. Second, the job descriptions on file at Noranda list these positions as moderate to considerable physical demand, illustrating that they do not conform to Dr. Frauwirth's restriction of non-strenuous work. See RX-5. Specifically, the ECL crane operator position requires the ability "to tolerate riding in a confined crane cab which is suspended overhead for prolonged periods of time." RX-5, p. 5. This requirement does not comply with Dr. Frauwirth's ankle restriction that Mr. Butler be able to change his sitting position frequently. Further, the crane is located in the potroom, where the magnetic field would pull on Mr. Butler's ankle braces. See TR 142. Moreover, when Dr. Ritter approved this job, he wrote that Mr. Butler "may have intermittent difficulty getting in and out of the crane on what he considers his bad days." Next, the package trucker job requires sitting two hours in the forklift without break and traveling over rough terrain in the forklift. RX-5, pp. 6-9. Similarly, the job description for the Ericson tow motor operator states that the Ericson is "vibratory and travels over uneven terrain." RX-5, p. 12. Again, neither of these positions' requirements complies with Dr. Frauwirth's restrictions of non-strenuous work and the ability to change sitting positions frequently.

For the foregoing reasons, the Court finds that Employer has failed to meet its burden of establishing suitable alternative employment and, therefore, finds Claimant to be totally disabled. Because Mr. Butler's ankle restrictions alone preclude him from performing any of the jobs offered by Employer, the Court finds that Mr. Butler was permanently totally disabled as of November 26, 2002, the date on which his ankle injuries reached maximum medical improvement.

COMPENSATION

When a Claimant suffers multiple injuries from one accident, his total compensation must not exceed the amount payable in the event of total disability, or 2/3 of his pre-injury average weekly wage. I.T.O. of Baltimore v. Green, 185 F.3d 239, 243 (4th Cir. 1999); Brady-Hamilton Stevedore Co. v. Director, OWCP, 58 F.3d 419, 421 (9th Cir. 1995); Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.4 (1985); Tisdale v. Owens-Corning Fiberglass Co., 13 BRBS 167 (1981), aff'd mem. sub. nom. Tisdale v. Director, OWCP, 698 F.2d 1233 (9th Cir. 1982), cert. denied, 462 U.S. 1106 (1983). A totally disabled claimant is entitled to a minimum compensation rate of the lesser of his pre-injury average weekly wage or 50% of the National Average Weekly Wage. § 906(b)(2); Director, OWCP, v. Bath Iron Works Corp., 885 F.2d 983, 991 (1st Cir. 1989). In January 2002, the minimum compensation rate for total disability was $241.52. See U.S. Department of Labor, Employment Standards Administration, Division of Longshore and Harbor Workers' Compensation, National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 10(f)), at http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm (visited January 7, 2004).

In the current case, Claimant suffered multiple injuries, including ankle and back injuries. His ankles reached MMI on November 26, 2002, and his neck subsequently reached MMI on April 29, 2003. Claimant argues that he is entitled to both permanent partial disability compensation for his scheduled ankle injury and permanent total disability for his unscheduled neck injury. His argument is based upon Bass v. Broadway Maintenance, 28 BRBS 11 (1994), which held that where an unscheduled injury results from the natural progression of a scheduled injury, a claimant may receive separate awards for each injury. Id. at 17. The Court clarifies that this jurisprudence is inapplicable to the current case. This Court's finding that Claimant became permanently totally disabled on November 26, 2002, mandates that he receive two-thirds of his pre-injury average weekly wage as of that date. Since Claimant is already receiving the maximum amount of compensation available on the date his neck injury becomes permanent, April 29, 2003, he is precluded from recovering further. Therefore, the Court finds that Claimant is entitled to temporary total disability benefits from the date of his accident, January 16, 2002, through November 26, 2002, at which time his ankles reached MMI. Thereafter, Claimant is entitled to permanent total disability benefits from

November 26, 2002 and continuing. Claimant shall be compensated according to the stipulated average weekly wage of $853.93 and its corresponding compensation rate of is $569.32.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) the employer shall furnish such medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980). An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; see also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983).

The Court finds that Noranda is responsible for all past and future medical expenses arising from Mr. Butler's ankle and neck injuries. Claimant has stated that he is currently seeing Dr. Pfefferkorn for hypertension, but is not receiving any medical care for his ankle and neck injuries. Dr. Frauwirth, his pain management specialist, has relocated his practice to another state, and Claimant is awaiting approval from Employer for a referral to Dr. Frauwirth's former facility, South East Medical Center. The Court finds that Employer is responsible for approving this referral and continuing to cover Mr. Butler's future medical expenses.

ATTORNEY'S FEES

Under Section 28(b) of the Act, when an employer voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid by the employer. See 33 U.S.C. § 928(b); Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173, 176 (1993).

In this case, Employer voluntarily paid Mr. Butler temporary total disability until January 26, 2004, at which time Employer ceased payment. See JX-1. This Court has awarded Claimant permanent total disability as of November 26, 2002. Claimant has succeeded in obtaining greater compensation than that paid by Employer. Therefore, the Court finds that Claimant is entitled to attorney's fees from Employer.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1) Employer shall pay to Claimant compensation for temporary total benefits from January 16, 2002 through November 26, 2002 and compensation for permanent total disability benefits from November 26, 2002 until present, based on an average weekly wage of $853.93.

2) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

3) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate shall be calculated as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

4) Employer/Carrier shall pay Claimant for all reasonable and necessary future medical expenses that are the result of Claimant's employment-related injury of January 16, 2002.

5) Claimant's counsel shall have thirty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer/Carrier shall have thirty (30) days from receipt of the fee petition in which to file a response.

So ORDERED.

A

RICHARD D. MILLS
Administrative Law Judge